

No. 12117

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a Corporation,

Appellant,
vs.

HAROLD BERLINER, Former Collector of Internal Revenue for the First Collection District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff and Appellant:

GEORGE L. BULAND, ESQ.,
FRANK J. GALLAGHER, ESQ.,
65 Market St.,
San Francisco 5, California.

For Defendant and Appellee:

FRANK J. HENNESSY, ESQ.,
United States Attorney,
WILLIAM E. LUCKING, ESQ.,
Assistant United States Attorney,
San Francisco, California.

In the District Court of the United States for the Northern District of California, Southern Division.

Civil Action No. 25664-R

SOUTHERN PACIFIC COMPANY,
a Corporation,

Plaintiff,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue for the First Collection District of California,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES

The plaintiff herein, for cause of action against the defendant, alleges:

1. That plaintiff is now and has been at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky with its principle office in San Francisco, California, within the First Internal Revenue Collection District of the State of California.

2. Defendant at all times between January 1, 1943 and March 31, 1945, was the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue District of California, but is not now in office as such collector. Said defendant is a resident of San Francisco, California and of [1 *] the southern division of the northern United States District Court district of said state, and the venue of this

*Page numbering appearing at foot of page of original certified Transcript of Record.

suit is laid in said division and district of defendant's residence pursuant to 28 U.S.C. 112 and 114.

3. This is a suit to recover stamp taxes unlawfully collected by defendant from plaintiff under Sections 1800 and 1802(a) of the Internal Revenue Code (26 U.S.C. 1800, 1802(a)). Said suit therefore arises under the laws of the United States providing for internal revenue, jurisdiction over which is conferred upon this court by 28 U.S.C. 41(5). Said suit is also one of a civil nature, at common law, arising under the Constitution or laws of the United States in which the matter in controversy, exclusive of interest and costs, exceeds \$3000, and in which plaintiff and defendant are residents of different states, jurisdiction over which is placed in this court by 28 U.S.C. 41(1) (a) and (b).

4. Section 1800 of the Internal Revenue Code (26 U.S.C. 1800) provides for the imposition of a stamp tax in accordance with the provisions of Section 1802(a) of the Code (26 U.S.C. 1802(a)) (derived from Section 800 of the Revenue Act of 1926, 44 Stat. 99, 101, as amended), which, at the time of the transaction herein referred to, provided as follows:

"Original issue. On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment

trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: Provided, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, [2] per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued."

5. To implement said Act the Commissioner of Internal Revenue has issued certain regulations.

Article 29 of Regulations 71 (1932 Edition) provides:

"The following are examples of issues not subject to the tax:

* * * *

(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account or otherwise."

Section 113.25 of Regulations 71 (1941 Edition) provides as follows:

"* * * * the following are examples of issues not subject to the tax:

* * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise."

6. Plaintiff, between the date of its incorporation in 1884 and April 23, 1940, issued, and had outstanding on the latter date, 3,772,763.0564 shares of capital stock having a par value of \$100. A substantial part of said stock was issued between July 1, 1898 and April 12, 1902, or subsequent to December 1, 1914, and during such periods federal stamp taxes on the issuance of capital stock, similar to, but earlier than that now imposed by Section 1802(a) of the Internal Revenue Code, were in effect, and on all [3] such parts of its outstanding capital stock, plaintiff duly paid the federal stamp taxes then in effect.

7. On or about April 23, 1940, after appropriate amendment of its articles of incorporation, plaintiff issued in exchange for its then outstanding par value stock, an identical number of shares of no par value stock.

8. On or about July 15, 1942, the Commissioner of Internal Revenue ruled that original issue stamp tax under Section 1802(a) of the Internal Revenue Code became due upon the entire amount of no par stock issued in the above transaction of April 23, 1940.

9. After demand for payment of such tax, plaintiff, under protest, paid such tax on or about February 26, 1943, by purchasing from defendant, as then duly acting Collector of Internal Revenue for the First Collection District of California, revenue stamps in the amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95), and on the same day affixing said stamps to one sheet of its stock transfer record for April 23, 1940.

10. On or about June 11, 1943, and within the four-year period prescribed by Sections 3304(c) and 3313 of the Internal Revenue Code (26 U.S.C. 3304(c), 3313), plaintiff duly filed with defendant a claim for refund of said taxes and for redemption of said stamps, together with statement in support of this claim. A copy of said claim and statement is attached hereto as Exhibit A, and is incorporated by reference herein.

11. By letter dated March 9, 1944, and mailed on or about that date, the Commissioner of Internal

Revenue notified defendant of the disallowance of said claim. A copy of said letter of disallowance is attached hereto as Exhibit B, and is incorporated by reference herein.

12. The Interstate Commerce Commission, pursuant to power [4] conferred upon it by the Interstate Commerce Act, has prescribed a uniform system of accounts for steam railroads for use by such railroads in preparing balance sheets and also in submitting annual reports to the Commission. The Commission's duly issued and published regulations applicable at the time plaintiff's par value stock was exchanged for no par value stock on April 23, 1940, provided for an account entitled "Capital Stock", numbered 751, and stated that when stock certificates issued by a carrier "have a par value they shall be included in this account at par value". Said regulations further provided for an account, numbered 753, entitled "Premium on Capital Stock" in which was to be included "the excess of the actual money value of the consideration received for stock actually issued . . . over the par value of such stock". In addition, they stated: "When stock having par value is exchanged for stock without par value, sums resting in the . . . premium account for the subclass of stock retired shall be cleared to this account (No. 751) to the extent of the premium . . . applicable to the shares retired". The forms prescribed by the Commission show that these two items, 751 and 753, were merely sub-accounts of one general account entitled "Stock", and were to be added to-

gether to produce "Total Stock". Thus, the forms prescribed by the Commission for balance sheets and the forms issued by the Commission for annual reports to it were set up in the following form, insofar as here pertinent:

STOCK

751 Capital stock	XX
753 Premium on capital stock	XX
Total Stock	XX

13. Pursuant to said regulations of the Commission, plaintiff's capital stock account, prior to the exchange of no par stock of April 23, 1940, as shown in its balance sheet for March 31, 1940 (copy of the pertinent page of which is attached hereto as Exhibit C, and incorporated by reference herein), was [5] set forth as follows:

Stock	
751 Capital Stock	\$377,276,305.64
753 Premium on Capital Stock	6,304,845.00
Total Stock	\$383,581,150.64

Plaintiff's capital stock account prior to the above exchange was also shown in identical form in its annual report to the Interstate Commerce Commission, except that the figures in cents were not shown. Thus, the pertinent page of such report for the year 1940 (copy of which is attached hereto as Exhibit D and incorporated by reference herein), in the left hand column thereof, entitled "Balance

at beginning of year" carried this account as follows:

Stock

751 Capital Stock	\$377,276,306
753 Premium on Capital Stock	6,304,845
Total Stock	\$383,581,151

14. The sub-account 751, entitled "Capital Stock", set forth in the preceding paragraph, represented the total par value of plaintiff's then outstanding capital stock. The facts giving rise to the \$6,304,845 item in the sub-account entitled "Premium on Capital Stock", set forth in the preceding paragraph, are as follows:

Under the terms of Article Four of an indenture dated June 1, 1909 between plaintiff and Guaranty Trust Company of New York securing an authorized issue of \$82,000,000 of plaintiff's Four Per Cent 20-Year Gold Bonds, the holders of such bonds were given the privilege, on or before June 1, 1919, of converting their bonds into paid-up shares of plaintiff's common stock at the rate of \$130 par value of bonds for each \$100 par value of stock. Pursuant to this provision, during 1910 and 1911, bonds in the total par value of \$662,090 were surrendered and 5,093 shares of stock [6] having a total par value of \$509,300 were issued by plaintiff in exchange. The excess of the amount of the bonds over the par value of the capital stock issued was thus \$152,790. In 1919 further bonds having a par value of \$26,657,150 were exchanged for 205,055 shares of capital stock having a total par

value of \$20,505,000. The excess of the amount of such bonds over the par value of the capital stock issued was \$6,151,650. Under another indenture dated May 1, 1929 between plaintiff and Guaranty Trust Company of New York plaintiff issued its 40-year 4½ Per Cent Gold Bonds of 1929, which bonds had warrants attached entitling the owner to purchase, on or before May 1, 1934, three shares of plaintiff's \$100 par value stock at \$145 per share plus adjustment of accrued dividends. During 1930, under these warrants, nine shares of plaintiff's capital stock having a total par value of \$900 were issued in return for a total purchase price of \$1305. The excess of the amount received over the par value of the capital stock issued in this last transaction was \$405. The several excesses of the amounts received over the par value of the stock issued in return in the above transactions, totaling \$6,304,845, were, prior to the stock exchange of April 23, 1940, carried, as aforesaid, in plaintiff's general capital stock account under sub-account 753, "Premium on capital stock." This was pursuant to the accounting regulations of the Interstate Commerce Commission, set forth in paragraph 12 hereof, requiring such excess amounts to be carried in such sub-account. Pursuant to the same regulations, the par value of all capital stock issued in such transactions was shown, together with the par value of all other capital stock issued, in plaintiff's general capital stock account under sub-account 751, "Capital Stock".

15. Pursuant to the Commission's regulations set forth in paragraph 12 hereof, plaintiff's capital

stock account, subsequent to the exchange of no par stock for par value stock on [7] April 23, 1940, as indicated in its balance sheet for April 30, 1940 (copy of the pertinent page of which is attached hereto as Exhibit C-1 and incorporated by reference herein), was shown as follows:

Stock

751 Capital Stock	\$383,581,150.64
753 Premium on Capital Stock
Total Stock	\$383,581,150.64

Plaintiff's capital stock account subsequent to the above exchange was also shown in identical form in its annual report to the Interstate Commerce Commission for 1940, except that the figures in cents were not shown. Thus, the pertinent page of such report, as shown in the right hand column of Exhibit D, entitled "Balance at close of year", carried this account as follows:

Stock

751 Capital Stock	\$383,581,151
753 Premium on Capital Stock
Total Stock	\$383,581,151

16. The only change occasioned in plaintiff's accounts by the stock exchange of April 23, 1940, was the merger, in accordance with the Commission's regulations referred to in paragraph 12 hereof, of sub-account 753 into sub-account 751. There was no change in plaintiff's surplus account, no change in the number of shares of stock outstanding, and no

change in the "total stock" account prescribed by the Commission.

17. The Commissioner of Internal Revenue in his letter of March 9, 1944 rejecting plaintiff's claim for refund (Exhibit B hereto) has held that said capital stock stamp tax imposed by Sections 1800 and 1802(a) of the Internal Revenue Code became due with respect to the entire 383,581,150.64 amount carried in [8] plaintiff's sub-account 751 (capital stock) as a result of the change of plaintiff's stock on April 23, 1940 from \$100 par value shares. The effect of this holding was to require payment of said tax upon the actual value of the entire 3,772,763.0564 no par shares then issued, and the tax paid by plaintiff to defendant, as indicated in paragraph 9 hereof, was calculated and paid on such basis. The Commissioner, in so ruling in said letter of disallowance, took the position that the \$6,304,845 item carried prior to April 23, 1940 in plaintiff's sub-account 753, styled "Premium on Capital Stock", was not an item in plaintiff's capital stock accounts, and that when such amount was transferred to sub-account 753, "Capital Stock", as a result of the exchange of stock, there was a dedication of additional capital. The Commissioner, therefore, held that the transaction was not within the provision of Section 113.25 of Regulations 71 (1941 Edition) (set forth in paragraph 5 hereof), which exempts from tax "the issue of stock in a recapitalization or reorganization where there is no dedication of additional capital either by transfer of earned surplus or otherwise." The

Commissioner further took the position that tax was due with respect to said entire \$383,581,150.64 amount because:

"The new capital and the old capital were intermingled in such a way that it is impossible to allocate to specific shares the increase in the capital stock accounts. Each share, therefore, represents both tax-paid and non tax-paid capital."

18. In fact, the exchange by plaintiff of its no par value stock for its par value stock as above mentioned, was not an original issue, in the amount of \$383,581,151 or in any amount, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by plaintiff, within the meaning of Section 1802(a) of the Internal Revenue Code; such exchange occurred without plaintiff's capital being increased, either by transfer of [9] surplus to capital account, or otherwise, and such exchange occurred without dedication of additional capital, either by transfer of earned surplus, or otherwise.

19. The collection by defendant of said stamp taxes from plaintiff upon the issuance by plaintiff of its no par stock, as aforesaid, and the disallowance by the Collector of Internal Revenue of plaintiff's claim for refund with respect to such payment were erroneous, arbitrary and without authority of law.

20. Insofar as defendant collected stamp taxes upon, and insofar as the Commissioner disallowed

plaintiff's claim for refund with respect to such collection of taxes upon, that portion of the said issue of no par stock represented by the \$6,304,845 sub-account entitled "Premium on capital stock" which was transferred at the time of issuance to the "Capital stock" sub-account, defendant and said Commissioner acted erroneously, arbitrarily and without authority of law in the following particulars:

A. They disregarded the applicable accounting regulations, classifications and forms of the Interstate Commerce Commission, set forth in paragraph 12 hereof, under which both the premium sub-account and the capital stock sub-account were parts of plaintiff's general capital stock account, and under which the transfer of said item from the former sub-account to the latter sub-account as the result of said issuance did not result in any dedication of additional capital;

B. As a result of such disregard they failed to conclude that said issue occasioned "no dedication of additional capital" and that the issue was therefore exempt from tax under the provisions of Section 113.25 of Regulations 71 (1941 Edition) (set forth in paragraph 5 hereof), as was the case;

C. They regarded said Section 113.25 of Regulations 71 [10] (1941 Edition) as applicable in the premises rather than Article 29 of Regulations 71 (1932 Edition) (set forth in paragraph 5), even though the former regulations were not adopted until after the date of issuance of the no par stock;

D. They failed to conclude that said exchange was "effected without the capital being increased"

within the meaning of said Article 29 of Regulations 71 (1932 Edition), and was therefore exempted from tax by virtue of its provisions, as was the case; and

E. They failed to conclude that such transaction was not an "original issue" within the meaning of Section 1802(a) of the Internal Revenue Code and therefore not taxable under its provisions.

21. Insofar as defendant collected taxes upon, and insofar as the Commissioner disallowed plaintiff's claim for refund with respect to such collection of taxes upon, the remaining portion of said issue of no par stock, defendant and said Commissioner acted erroneously, arbitrarily and without authority of law in the following particulars:

A. They failed to take account of the fact that irrespective of whether the issuance of the portion of the no par stock referred to in paragraph 20 hereof could be considered as resulting in an addition to capital, which plaintiff denies, the issuance of the remaining stock did not so result, since such stock represented the \$377,276.305.64 amount carried, as hereinbefore indicated, in plaintiff's capital stock sub-account both before and after said issuance;

B. They therefore failed to conclude that in any [11] event the issuance of said portion of the stock was made "without the capital of the corporation being increased" and resulted in "no dedication of additional capital" within the meaning respectively of Article 29 of Regulations 71 (1932 Edition) and Section 133.25 of Regulations 71 (1941 Edition), and was therefore exempt from

tax by virtue of the provisions of said regulations, as was the case;

C. They failed to conclude that, in any event, under settled judicial rulings the issuance of said portions of the stock was not an "original issue" within the meaning of Section 1802(a) of the Internal Revenue Code and therefore not taxable under its provisions;

D. They concluded that the issuance of said portion of the stock was taxable because new capital and old capital may have been intermingled, when there is no authority either in law or in the Commissioner's regulations for taxing a part of an issue not independently resulting in dedication of new capital and thus not independently taxable as an original issue merely because it may be intermingled with a portion which might result in the dedication of new capital and thus be taxable;

E. They failed to follow the practice of the Commissioner in other cases, including one in this judicial circuit, of making a segregation between the part of an issue not taxable as an original issue and the part taxable as an original issue, and taxing only the former part. Especially is such failure arbitrary, where the only portion of the issue which could conceivably be regarded as resulting in dedication of new capital, namely, that represented by the \$6,304,845 item in plaintiff's premium sub-account, was less than 2% of the total of [12] plaintiff's capital stock account after the issuance; and

F. They failed to conclude that in taxing said portion of the issue representing, beyond doubt, old

capital, with respect to which the original issues either occurred prior to the effective date of the Revenue Act of 1926 (the basis of Section 1802(a) of the present Internal Revenue Code), and in many instances were subjected to tax under earlier stamp taxes, or occurred after the effective date of said Act, and have already been taxed thereunder, they were subjecting plaintiff to arbitrary, retro-active and multiple taxation.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$46,687.95 with interest thereon from February 26, 1943, as provided by law, for the costs of this suit, and for such other and further relief as to the court may seem proper.

/s/ GEORGE L. BULAND,
Counsel for Plaintiff. [13]

State of California,
City and County of San Francisco—ss.

H. J. Carroll, being first duly sworn, deposes and says:

That he is an officer, to-wit, Secretary of Southern Pacific Company, the plaintiff in the above-entitled action, and makes this verification for and on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof: that the same is true of his own knowledge.

H. J. CARRALL.

Subscribed and sworn to before me this 9th day of February, 1946.

(Seal) A. L. WHITTLE,
Notary Public in and for the City and County of
San Francisco, State of California. [14]

EXHIBIT A**Form 843**

Treasury Department
Internal Revenue Service
Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [] Refund or Tax Illegally Collected.
- [] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Francisco—ss.

Name of taxpayer or purchaser of stamps:
Southern Pacific Company.

Business address: 65 Market Street, San Francisco, California.

Residence: A Kentucky corporation.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed.
No return filed. Stamps purchased from Collector

of Internal Rev., 1st District, San Francisco.

* * * *

3. Character of assessment or tax original issue documentary stamp tax under Sec. 1802(a) of Internal Revenue Code as amended.

* * * *

5. Date stamps were purchased from the Government February 26, 1943.

6. Amount to be refunded forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95).

* * * *

The deponent verily believes that this claim should be allowed for the following reasons: Sec. 3304 of the Internal Revenue Code as amended (Sec. 1 of Act of May 12, 1900, 31 U. S. Stat. 177, as amended by Sec. 1013(a) of the Revenue Act of 1924, 43 U. S. Stat. 343). For reasons stated in rider attached hereto.

(Stamps are attached to stock transfer record of April 23, 1940, and may be inspected at Room 662, 65 Market Street, San Francisco, Calif.)

SOUTHERN PACIFIC CO..

/s/ F. L. McCAFFERY,

General Auditor.

Sworn to and subscribed before me this 11th day of June, 1943.

A. L. WHITTLE,

Notary Public.

[15]

**STATEMENT IN SUPPORT OF ANNEXED
REFUND CLAIM**

1. The Commissioner of Internal Revenue by letter dated July 15, 1942, addressed to Internal Revenue Agent R. C. Cannedy at Los Angeles, California, has ruled that original issue stamp tax became due under Section 1802(a) of the Internal Revenue Code, as amended, with respect to the entire \$383,581,150.64 carried in Southern Pacific Company's capital stock account, as a result of the change of said Company's stock in April, 1940, from \$100 par value shares to no par shares. The position taken by the Commissioner was that the Company's capital stock account immediately following the change to no par stock was increased by \$6,304,845, formerly styled "Premium on Capital Stock"; that this amount represented capital with respect to which no previous issue tax had ever been paid; and his ruling was that the tax was due with respect to the full amount of \$383,581,150.64 in the capital stock account because "the new capital and the old capital were intermingled in such a way that it cannot be said that the increase in the capital stock account can be allocated to specific shares." Demand was made upon the Company for payment of the issue tax with respect to the entire amount in the capital stock account following the change to no par shares.

2. On or about February 26, 1943, Southern Pacific Company purchased from Harold A. Berliner, Collector of Internal Revenue, First District, San Francisco, California, revenue stamps in the

amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95), and on the same day affixed said stamps to one sheet of the Company's stock transfer record for April 23, 1940. The purchase of the stamps [16] was made under protest.

3. Section 1800 of the Internal Revenue Code provides for the imposition of a tax in accordance with the provisions of Section 1802 of the Code, as amended, which, at the time of the transaction herein referred to, provided as follows:

"Sec. 1802 Capital Stock (and similar interests).
(a) Original Issue. On each original issue, whether on organization or reorganization, of shares or certificates of stock, * * * on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation, * * *, 10 cents; provided, that where such shares or certificates are issued without par or face value, the tax shall be 10 cents per share * * *, unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the discount shall be 2 cents on each \$20, of actual value, or fraction thereof, of such certificates, (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stockbooks or corresponding records

of the organization and not to the certificates issued.”

It is the company's contention, for reasons explained below, that the exchange of par for no par stock is not an original issue under the provisions of Section 1802(a).

The company also contends that the issue is exempt under Article 29(i) of Regulations 71 (1932 Edition), as well as Section 113.25 of Regulations 71 (1941 Edition).

Article 29 of Regulations 71 (1932 Edition) provides that:

“The following are examples of issues not subject to the tax:

* * * *

(i) The issue by a corporation of certificates of stock in exchange for outstanding certificates of its own stock where such exchange is effected without the capital of the corporation being increased, either by transfer of surplus to capital account, or otherwise.”

Section 113.25 of Regulations 71 (1941 Edition) provides as follows:

“* * * the following are examples of issues not subject to tax: [17]

* * * *

(f) The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise.”

4. Southern Pacific Company had total stock outstanding as set forth in the capital stock ac-

counts in the amount of \$383,581,150.64 immediately prior to the change from par value to no par stock. Under the accounting procedure prescribed by the Interstate Commerce Commission, when a railroad company has outstanding capital stock of a stated par value which has been issued at a premium, it is required to set forth such capital as follows: (a) the par value in an account entitled No. 751 "Capital Stock" and (b) the premium in an account entitled No. 753 "Premium on Capital Stock." Both items are capital stock accounts and added together they make up the Company's "Total Stock." Under the mandatory requirement contained in the Interstate Commerce Commission's accounting classifications, when stock having a par value is exchanged for stock without par value, sums in the premium account (No. 753) are transferred to Account No. 751. When the change from par value to no par value was made in the case of Southern Pacific Company stock, this change was made in accordance with required practice. The general "Capital Stock" caption, however, in balance sheet classification prescribed by the Interstate Commerce Commission showed no change in total. The two sub-accounts were merely merged into one general capital stock account, and there was no change in the Company's surplus account and no dedication of additional capital as a result of the change of the stock certificates from par to no par.

5. The facts giving rise to the \$6,304,845 "Premium on Capital [18] Stock" are as follows:

Under the terms of Article Fourth of an indenture dated June 1, 1909, between Southern Pacific Company and Guaranty Trust Company of New York, securing an authorized issue of \$82,000,000 of the Company's Four Per Cent 20-Year Gold Bonds, the holders of such bonds were given the privilege of converting their bonds into paid-up shares of common stock of the Company at the rate of \$130 par value of bonds for each \$100 par value of stock on or before June 1, 1919. In April, 1909, an amendment to the Charter of the Company had been made authorizing the capital stock to be increased by \$100,000,000, and \$63,000,000 par value of the increased stock was set aside and reserved for the purpose of making the conversion of the said bonds into capital stock.

The Southern Pacific Company annual reports for 1910 and 1911 show that up to January 9, 1912, \$662,090 par value of said bonds were surrendered and \$509,300 par value of stock was issued in place thereof, i.e., bonds of a par value of \$662,090 were exchanged or paid for 5,093 shares of the capital stock of the Company having a par value of \$100 per share. To comply with Interstate Commerce Commission accounting practice there was a segregation within the stock accounts of the amount of the par value of 5,093 new shares (\$509,300) and the said \$152,790 excess "Premium on Capital stock," but the full \$662,090 representing the exchange price of the 5,093 shares was set up in the capital stock accounts. There was no law taxing the original issue of certificates of stock during the

years (1910 and 1911), when the above conversions were made, so that no tax was payable on the original issue of these 5,093 shares.

There were no more conversions of the Four Per Cent Bonds into shares of stock until May, June and July, 1919. During these months, however, bonds of a par value of \$26,657,150 were turned in and the Company issued in place thereof 205,055 shares of capital stock each share having a par value of \$100 (total par value \$20,505,500). The \$20,505,500 representing the par value of the new shares which were issued was set up in the capital stock accounts along with the \$6,151,650 excess of the face value of said bonds which were surrendered over the par value of said shares. Thus, 205,055 shares of \$100 par value stock were issued for a consideration of \$26,657,150, and the full \$26,657,150 went into the capital stock accounts, although it was divided into two sub-items to comply with Interstate Commerce Commission accounting procedure. Unlike the situation in 1910 and 1911 when a few of the bonds were exchanged for shares of stock as above set forth, at the time the 205,055 shares were issued in exchange for the bonds in 1919, there was a Federal documentary stamp tax on the original issue of stock. The War Stamp Taxes Law (Title VIII of "An Act to Provide Revenue to Defray War Expenses, and for Other Purposes," approved October 3, 1917 (Public—No. 50—65th Congress)) provided: [19]

"Original Issue of Stock. 3. Capital stock, issue: On each original issue, whether on organization or

reorganization, of certificates of stock by any association, company, or corporation, on each \$100 of face value or fraction thereof, 5 cents:

"Provided, That where capital stock is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of \$100 per share, in which case the tax shall be 5 cents on each \$100 of actual value or fraction thereof.

"The stamps representing the tax imposed by this subdivision shall be attached to the stockbooks and not to the certificates issued."

In accordance with the law, revenue stamps at the rate of 5 cents on each \$100 of par value of the 205,055 shares of \$100 par value stock were purchased by Southern Pacific Company and actually attached to the stock books, the said stamps costing \$10,252.75. That the face amount of the bonds which were exchanged for the 205,055 shares was a figure in excess of the par value of said shares is of no consequence in so far as the stamp tax is concerned for the fact is that the law required payment of the tax on the issuance of par value stock at the rate of 5 cents on each \$100 of face value or fraction thereof. Tax at such rate was paid on the full amount of the shares which were issued in accordance with the law then in effect, and the full proceeds from the issuance of these shares (both the \$20,505,500 par value of the stock and the \$6,151,650 so-called "Premium"), although separated as sub-items in accordance with Interstate Commerce Commission accounting practice,

were set up in the Company's capital stock accounts.

The Remaining \$405 of the \$6,304,845 premium item in the capital stock account prior to the change from par value to no par value came about as follows:

Under an indenture dated May 1, 1929, between Southern Pacific Company and Guaranty Trust Company of New York, Southern Pacific Company issued its 40-Year 4½ Per Cent Gold Bonds of 1929, which bonds had warrants attached entitling the owner to purchase on or before May 1, 1934, three shares of Southern Pacific Company's \$100 par value stock at \$145 per share, plus adjustment of accrued dividends. A total of nine shares of Southern Pacific Company's stock was purchased under this warrant in the year 1930 prior to the great drop in security prices, and, in accordance with Interstate Commerce Commission accounting practice, the full \$1,305 purchase price was put in the capital stock accounts, divided, as in the instances set forth above, to show the \$900 of par value of said shares in one sub-item and the \$405 premium over and above the par value in another sub-item called "Premium on Capital Stock."

At the time of this transaction in 1930 the original issue tax was 5 cents on each \$100 of face value or fraction thereof where capital stock had a par or face value (Title VIII, Revenue Act [20] of 1926, as amended). The correct amount of revenue stamps were affixed to the stock books of the Company at the time these nine shares were issued.

It is submitted on the above facts that the \$6,304,845 was from the beginning an entry in the capital stock accounts of the Company representing a portion of the consideration paid for shares of capital stock issued, and that the full amount of the original issue tax was paid as required by law when the said certificates were issued.

The premium (except the small amount received when there was no stamp tax levy) was realized upon tax paid issuance of capital stock. Upon original issue the stamp tax was paid pursuant to law, although the premium was not included in the computation of the tax paid or tax free capital, and it is contended that reissue of these shares is non-taxable. The premium received on shares issued when there was no capital stock tax, constitutes capital on which no tax was due upon original issue and none is due upon reissue.

6. The transfer of the \$6,304,845 of so-called "Premium on Capital Stock" did not represent an increase in the capital stock account or a dedication of new capital by transfer of earned surplus or otherwise. There was no new contribution to the capital stock by the stockholders and no part of the corporate surplus was assigned to capital accounts. Prior to the change from par to no par shares, the total amount in the said capital stock accounts was \$383,581,150.64 after the change to no par shares, the amount in said accounts was still \$383,581,150.64. Prior to the change from par to no par shares, the total corporate surplus was \$373,381,196.20; after the change to no par shares,

the total corporate surplus was still \$373,381,196.20. [21] The change from par to no par was nothing more than a change in the form of the certificates. There was no revaluation of the properties of the Company with appreciation thereof and increase in values transferred to capital account. There was no change in the assets of the Company and no change in the interests of the shareholders. This was an exact exchange; the capital account which represented the new issue was exactly the same as the capital account representing the old issue. There was no change of ownership and no new shares were created. The rights of the stockholders were neither increased nor lessened by the change from par value stock to no par. It is true that the capital stock accounts of the Company were subdivided in the case of par value stock so as to show the par value as one item and premium on capital stock in another item. This subdivision is a mandatory requirement of the Interstate Commerce Commission. It would seem manifestly unjust for one branch of the Federal Government, the Treasury Department, to exact the tax here involved from a taxpayer on its entire capital stock because the taxpayer has followed the mandatory requirements of another branch of the Federal Government, the Interstate Commerce Commission, in subdividing its capital stock accounts. The substance of the matter, rather than the form, should be the determining factor. Here the new shares of no par value represented exactly the same net assets of the original issue: no new capital was brought

into the net assets of the Company by virtue of the transaction. Under the circumstances, the stamp tax is not payable.

Cleveland Provision Co. v. Weiss, 4 F (2d) 408;

Edwards v. Wabash Ry. Co., 264 F. 610; [22] West Virginia Pulp & Paper Co. v. Bowers, 293 F. 144, affirmed 297 F. 225;

The Bailey Co. v. Routhahn, 1 USTC Par. 112; The Cuba Railroad Co. v. U. S., 1 USTC Par. 114; 60 Ct. Cls. 272;

In re Grant-Lees Gear Co., 1 F. (2d) 393; Bureau ruling dated May 10, 1940, Par. 6281, 403 CCH.

Judge Westenhaver's explanation in the Cleveland Provision Case *supra*, of the facts in the W. Virginia Pulp Case is particularly apt. Apparently in the Pulp case there were two exchanges, the second of which was an exchange of one \$100 par share for four no-par shares. Judge Westenhaver stated that an examination of the record in the Pulp case showed that the questions whether the no par value certificates were original issues, whether the answer depends on the nature or kind of the reissued shares, whether a less tax was collected from shares originally issued then would have been on reissued no par shares, had all been clearly and forcibly presented. Yet the second circuit decided in a per curiam opinion that no tax was due. Furthermore, in the Cleveland Provision case, the court stated that "it is also immaterial that the stamp taxes would have been greater had the corporation

done originally that which it did in making this exchange of certificates."

There is a Ninth Circuit case—*Rio Grande Oil Company vs. Welch* (101 F. (2d) 454)—which appears to support the proposition that an exchange of par and no par stock involving a transfer of surplus to capital account, is subject to stamp tax. An examination of the record in this case, however, shows clearly (1) that the decision is limited to the tax on the amount of an increase in capital occasioned [23] by a transfer of surplus, and (2) that the tax on a number of shares representing the original capital account had been assessed by the Commissioner and later upon claim for refund had been abated as having been "erroneously" assessed.

In 1928 Rio Grande Oil Company authorized the exchange of its outstanding 240,000 \$25.00 par shares of capital stock for 1,200,000 no par shares. The par shares had been carried at \$6,000,000 as the only item in the capital account. The company revalued its assets and transferred (1) \$32,538,744.62 from surplus (appreciation of property and paid-in surplus) and (2) the amount of \$6,000,000 in its original capital account, to a new capital account totaling \$38,538,744.62.

An examination of the record in this case in the Ninth Circuit reveals the following facts which do not appear in the opinion:

In January, 1933, the Commissioner assessed a stamp tax of \$19,269.38 on the 1,200,000 no-par shares, taking as the value of the no-par shares

the amount of the new capital account \$38,538,744.62 and dividing it by 1,200,000 shares, resulting in a value of \$32.12 minus for each no-par share. On May 26, 1933, a claim for abatement filed by the company was allowed by the Commissioner in the amount of \$3,000 and eventually rejected for the balance. Apparently the amount abated was the tax on a number of no-par shares whose aggregate value equaled the amount of the original par share capital account of which a stamp tax had previously been paid.

Upon a suit in the U. S. District Court for the Southern District of California, Central Division, the court held in an unreported [24] opinion that "the capital stock stamp tax on the increased amount over the original capital was proper" and the decision was affirmed by the Ninth Circuit.

In the brief filed by the Government in the Circuit Court it is stated:

"The tax was assessed by the Commissioner of Internal Revenue in the amount of \$19,269.38, and abated in the amount of \$3,000, as erroneously including 186,825 shares, or a proportionate amount of the 1,200,000 shares of no par value stock representing the outstanding \$6,000,000 capital stock liability of appellant on December 31, 1928".

The brief further states:

"While no dispute exists as to the amount of tax per share, or the rate employed in computing the tax in question, nevertheless, a further analysis of the findings of the District Court discloses that the assessment of tax, amounting to \$19,269.38 was

erroneously computed on the basis of 1,200,000 shares with an actual value of \$38,538,744.62; whereas, the tax in question, in this and the companion case, amounting to \$16,269.38, is apparently computed on the basis of 1,013,175 shares with an actual value of \$32,538,744.62, or 1,200,000 shares with an increase in value of that amount over and above the \$6,000,000 outstanding capital stock liability of appellant on December 31, 1828.

In other words, the Commissioner of Internal Revenue abated \$3,000 of the amount assessed as erroneously including 186,825 shares, representing the \$6,000,000 outstanding capital stock liability of appellant, with the result that the stamp taxes in question in the instant case and its companion case, amounting to \$16,269.38, were only imposed upon the issue of the 1,013,175 shares, or that portion of the 1,200,000 shares representing the \$32,538,744.62 increase in the capital or capital stock liability of appellant corporation."

In making a partial allowance of the claim for abatement the Commissioner merely took the amount of the original par value capital account of \$6,000,000 and divided it by \$32.12 minus (the value of a no par share) to arrive at the 186,825 shares representing the original capital on which stamp tax was abated. This is contra the [25] Commissioner's contention that, because of the "intermingling" of "the new capital and the old capital", tax is due on stock representing the entire capital account.

Even in a case which involved a reappraisal of assets and a transfer of surplus the Commissioner

abated stamp taxes to the amount of capital on which tax had originally been paid.

This case is in keeping with the recent modification of S.T. 899. (See M.T. 8 (43 CCH Par. 6299)).

7. The transfer books of Southern Pacific Company at New York contain the stamps representing payment of the original issue tax imposed upon the certificates of stock actually paid for in part by \$6,152,055, of the so-called "Premium on Capital Stock"; the remaining \$152,790 of the \$6,304,-845 of "Premium" represented a portion of the purchase price of shares issued prior to the time such a stamp tax was in effect. The full \$6,304,845 can be allocated to specific shares by tracing through the books of the Transfer Agent of Southern Pacific Company in New York City, and said books show payment in full of all taxes due with respect to the original issuance of said shares.

8. In view of the above it is respectfully submitted that the issue of no par shares of Southern Pacific Company stock is not subject to stamp tax; the purchase of the stamps in the amount of forty-six thousand six hundred eighty-seven and 95/100 dollars (\$46,687.95) under protest was erroneous and improper; and the cost of the stamps with interest from date of purchase should be refunded to Southern Pacific Company. [26]

Treasury Department
Washington 25

March 9, 1944

Office of Commissioner of Internal Revenue
Refer to MT:M:HB Cl. C-20191.

Southern Pacific Company,
65 Market Street,
San Francisco, California.

Gentlemen:

Your claim for redemption for used documentary stamps in the amount of \$46,687.95 has been examined.

The facts in the case show that your corporation, prior to the amendment of its articles of incorporation in April 1940, had common stock with a par value of \$100.00 per share outstanding in the total amount of \$377,276,305.64. The amendment of the articles of incorporation changed the shares of capital stock from \$100.00 per value per share to no par value common stock. No additional shares were issued after the amendment and the only other change was a transfer of \$6,304,845.00 from "Premium on Capital Stock Account" to the common stock account. To effect the change, a journal entry was made closing out the old common stock and two accounts called "Premium on Capital Stock", having a balance of \$405.00 and "Premium on S. P. Company Common Stock issued in Exchange for S. P. Company 4 per cent Convertible Bonds" having a balance of \$6,304,-

440.00 which were transferred to the new no par value common stock account, making a total credit to that account of \$383,581,150.64.

It is your contention that there was no increase in the capital stock account at the time of the change from par to no par value shares. You state that under the accounting procedure prescribed by the Interstate Commerce Commission, when a railroad company has outstanding capital stock of a stated par value which has been issued at a premium, it is required to set forth such capital in two accounts, (a) the par value in an account entitled No. 751 "Capital Stock" and (b) the premium in an account entitled No. 753 "Premium on Capital Stock". You argue therefore that both accounts are capital stock accounts and added together make up the company's "total stock". You state also that, under the requirements of the Interstate Commerce Commission, it was necessary to transfer the amounts previously carried as "Premium on Capital Stock" to the new common stock account when the stock was changed from par value to no par value. You contend therefore that the "premium" of \$6,304,845.00 was from the beginning "an entry in the capital stock accounts on the company's books, representing a portion of the consideration paid for shares of capital stock issued, and that the full amount of the original issue tax was paid as required by law when the certificates were issued." [27]

In your statement in support of your claim you set forth the facts showing the manner in which

the "premium" accounts were created. In 1909 certain bonds were issued by your company which gave the holders thereof the privileges of converting their bonds into paid-up shares of common stock of the company at the rate of \$130.00 par value of bonds for each \$100.00 par value of stock on or before June 1, 1919. Up to January 9, 1912, \$662,090.00 par value of the said bonds were surrendered and \$509,300.00 par value of stock was issued in place thereof, i.e., bonds of a par value of \$662,090.00 were exchanged or paid for 5,093 shares of the capital stock of the company having a par value of \$100.00 per share. The excess of the par value of the bonds over the par value of the stock, namely, \$152,790.00 was entered in the "Premium on Capital Stock Accounts". In 1919, bonds of a par value of \$26,657,150.00 were turned in and the company issued in place thereof 205,055 shares of capital stock, each share having a par value of \$100.00 (total par value \$20,505,500.00). The excess of the par value of the bonds over the par value of the stock, namely, \$6,151,650.00, was credited to the "Premium on Capital Stock Account". The proper amount of stamp tax was paid upon the issuance of the shares of stock issued on the exchange, numbering 205,055 shares.

The remaining \$405.00 of the \$6,304,845.00 premium item came about in the following manner. In 1929 the Company issued certain bonds which had warrants attached thereto entitling the owners thereof to purchase on or before May 1, 1934, three shares of the company's \$100.00 par value stock at

\$145.00 per share, plus adjustment of accrued dividends. A total of nine shares of the company's stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305.00. The excess of \$405.00 over par was credited to the account "Premium on Capital Stock". Stamp tax was paid with respect to these shares.

It is held that the "premium" accounts so far as the stamp tax laws are concerned, are not "capital stock" accounts. Accordingly, the premium accounts represent capital never previously dedicated to a specific capital account. The original issue tax in the case of par value stock is computed upon the basis of units of par value of \$100.00 or fractional part thereof, of the certificates issued. When shares of stock are issued at a premium, the tax is computed not on the basis of the price received but on the par value of the certificates. The same is true where stock is sold at less than par. The selling price is immaterial in the case of par value stock, so far as the computation of the tax is concerned. In those cases, therefore, where stock is issued for an amount over par, this office holds that the excess represents non tax-paid capital.

With respect to your contention that the amount representing premium on sale of capital stock actually was a part of the capital stock account although carried in a separate account, it is held such an amount is paid in surplus. [28]

Section 113.25 of Regulations 71 (1941 Edition) sets forth various issues of stock not subject to stamp tax under section 1802(a) of the Internal

Revenue Code, as amended. Paragraph (f) of the above section states as an example of an issue not subject to tax: "The issue of stock in a recapitalization or reorganization where there is no dedication of additional capital, either by transfer of earned surplus or otherwise". The opposite is also true and where there is a dedication of additional capital, an issue tax is incurred. In the above-described transaction, additional capital was dedicated to the capital account. While no new certificates representing the no par shares have been issued to replace the old par value shares, it is clear that new shares have been created and the tax applies whether or not certificates were issued to represent such shares.

The new capital and the old capital were intermingled in such a way that it is impossible to allocate to specific shares the increase in the capital stock account. Each share, therefore, represents both tax-paid and non tax-paid capital. Accordingly, it is held, under section 1802(a) of the Code, that issue tax is due with respect to the entire amount transferred to the new no par value stock account, namely, \$383,581,150.64.

In view of the foregoing, your claim is hereby rejected.

Very truly yours,

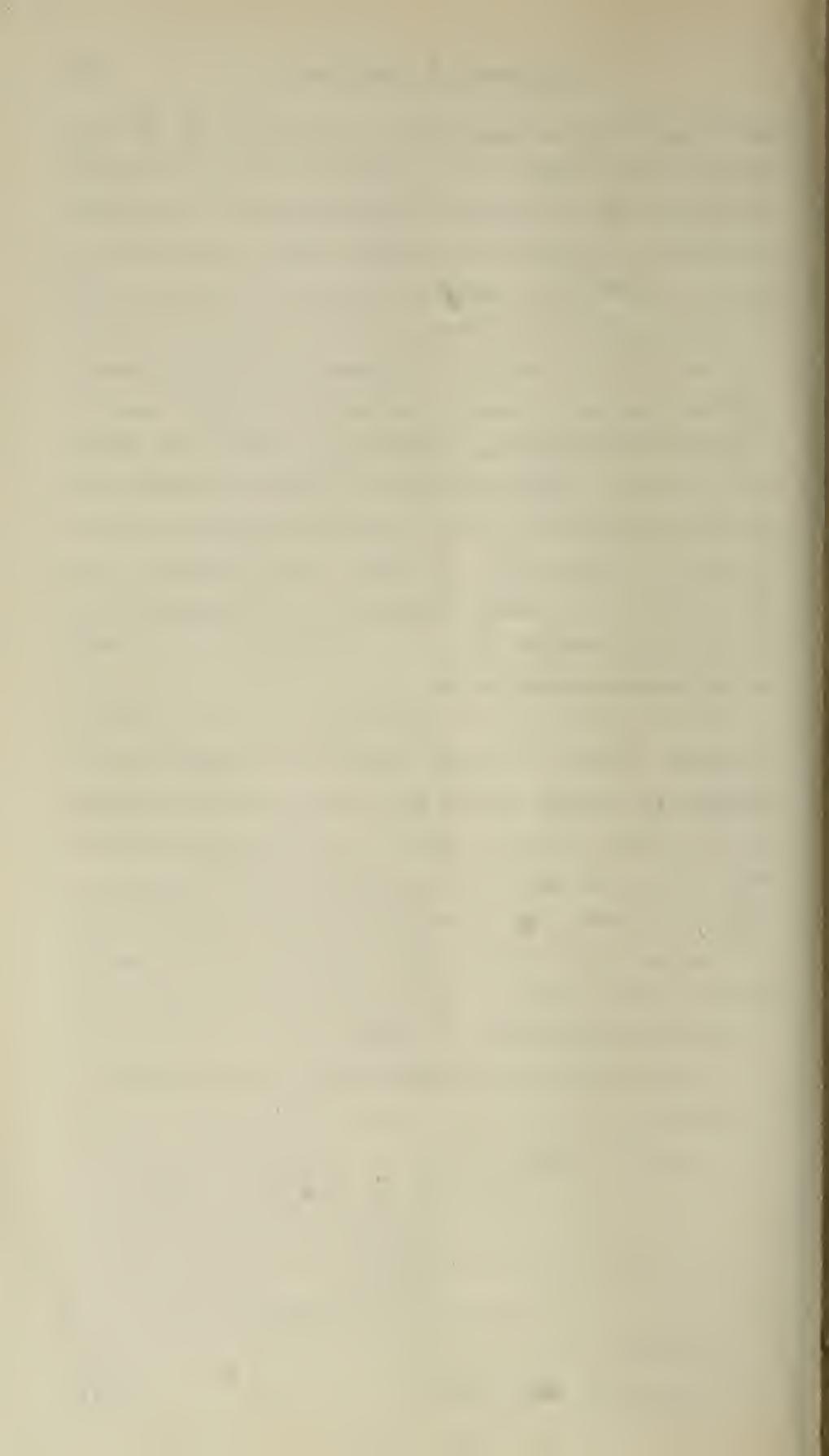
JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ D. S. BLISS,

Deputy Commissioner.

cc—Collector

San Francisco, California.



SOUTHERN PACIFIC COMPANY
BALANCE SHEET OF GENERAL LEDGER

BALANCE \$2,300

GENERAL ACCOUNT NUMBER

DETAIL OF LIABILITIES

STOCK SOCIETY DEBT TO OTHERS

751. CAPITAL STOCK

(a) Common Stock—Outstanding
Common Stock—Outstanding

\$71 41 35 64

751.1 Premium on capital stock

6 34 45 00

753.1 Premium on capital stock

6 34 45 00

753.1.1 Premium on S. P. Co. common stock, included in exchange for S. P. Co. 4% conv. bonds

6 34 45 00

753.1.2 Total Stock

6 34 45 00

754. GRANTS IN AID OF CONSTRUCTION

Grants in aid of construction

516 211 48

754.1 GOVERNMENTAL GRANTS

Grants in aid of construction

516 211 48

755. FUNDED DEBT UNMATURED

Funded debt unmatured

394 545 72 48

(a) Equipment obligations

S. P. Co. equipment trust certificates:

755a.1.1 Series H 4% Conv. June 1, 1928-40

755a.1.2 Series H 4% Conv. June 1, 1931-40

755a.1.3 Series H 4% Conv. July 1, 1931-41

755a.1.4 Series H 4% Conv. July 1, 1932-42

755a.1.5 Series H 4% Conv. Aug. 1, 1929-33

755a.1.6 Series H 4% Conv. Aug. 1, 1930-34

755a.1.7 Series H 4% Conv. Aug. 1, 1931-35

755a.1.8 Series H 4% Conv. Aug. 1, 1932-36

755a.1.9 Series H 4% Conv. May 1, 1931-45

755a.1.10 Series H 4% Conv. Nov. 1, 1931-51

755a.1.11 Series H 4% Conv. Mar. 1, 1938-52

755a.1.12 Series H 4% Conv. Oct. 1, 1940-54

755a.1.13 Series H 4% Conv. Aug. 1, 1940-54

(b) Mortgage bonds

Tower Coll. Ry. Co. 1st mortgage bonds—Due Nov. 1, 1941

639 000 00

Tower Coll. Ry. Co. 1st mortgage bonds—Due Mar. 1, 1972

639 000 00

755b.1.1 4% Conv. Bonds

755b.1.2 Required bonds

755b.1.3 Held by or for company

755b.1.4 Purchased Northern Ry. Co. 1st mortgage bonds—Due Jan. 1, 1945

755b.1.5 Held by or for company

755b.1.6 San Francisco Terminal 1st mortgage bonds—Due April 1, 1965

755b.1.7 San Francisco Terminal 1st mortgage bonds—Due April 1, 1965

755b.1.8 10% Coupon bonds

755b.1.9 10% Coupon bonds

755b.1.10 10% Coupon bonds

755b.1.11 Required bonds

755b.1.12 Held by or for company

755b.1.13 Collection of bonds

755b.1.14 Required bonds

755b.1.15 Emporium bonds

755b.1.16 Held by or for company

755b.1.17 Kress & Sons Finance Corporation

755b.1.18 1st mortgage bonds

755b.1.19 1st mortgage bonds

755b.1.20 1st mortgage bonds

755b.1.21 1st mortgage bonds

755b.1.22 1st mortgage bonds

755b.1.23 1st mortgage bonds

755b.1.24 1st mortgage bonds

755c.1.1 4% Conv. Bonds

755c.1.2 4% Conv. Bonds

755c.1.3 4% Conv. Bonds

755c.1.4 4% Conv. Bonds

755c.1.5 4% Conv. Bonds

755c.1.6 4% Conv. Bonds

755c.1.7 4% Conv. Bonds

755c.1.8 4% Conv. Bonds

755c.1.9 4% Conv. Bonds

755c.1.10 4% Conv. Bonds

755c.1.11 4% Conv. Bonds

755c.1.12 4% Conv. Bonds

755c.1.13 4% Conv. Bonds

755c.1.14 4% Conv. Bonds

755c.1.15 4% Conv. Bonds

755c.1.16 4% Conv. Bonds

755c.1.17 4% Conv. Bonds

755c.1.18 4% Conv. Bonds

755c.1.19 4% Conv. Bonds

755c.1.20 4% Conv. Bonds

755c.1.21 4% Conv. Bonds

755c.1.22 4% Conv. Bonds

755c.1.23 4% Conv. Bonds

755c.1.24 4% Conv. Bonds

755d.1.1 4% Conv. Bonds

755d.1.2 4% Conv. Bonds

755d.1.3 4% Conv. Bonds

755d.1.4 4% Conv. Bonds

755d.1.5 4% Conv. Bonds

755d.1.6 4% Conv. Bonds

755d.1.7 4% Conv. Bonds

755d.1.8 4% Conv. Bonds

755d.1.9 4% Conv. Bonds

755d.1.10 4% Conv. Bonds

755d.1.11 4% Conv. Bonds

755d.1.12 4% Conv. Bonds

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755d.1.14 4% Conv. Bonds

755d.1.15 4% Conv. Bonds

755d.1.16 4% Conv. Bonds

755d.1.17 4% Conv. Bonds

755d.1.18 4% Conv. Bonds

755d.1.19 4% Conv. Bonds

755d.1.20 4% Conv. Bonds

755e.1.1 4% Conv. Bonds

755e.1.2 4% Conv. Bonds

755e.1.3 4% Conv. Bonds

755e.1.4 4% Conv. Bonds

755e.1.5 4% Conv. Bonds

755e.1.6 4% Conv. Bonds

755e.1.7 4% Conv. Bonds

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755e.1.9 4% Conv. Bonds

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755e.1.12 4% Conv. Bonds

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755e.1.16 4% Conv. Bonds

755e.1.17 4% Conv. Bonds

755e.1.18 4% Conv. Bonds

755e.1.19 4% Conv. Bonds

755e.1.20 4% Conv. Bonds

755f.1.1 4% Conv. Bonds

755f.1.2 4% Conv. Bonds

755f.1.3 4% Conv. Bonds

755f.1.4 4% Conv. Bonds

755f.1.5 4% Conv. Bonds

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755f.1.11 4% Conv. Bonds

755f.1.12 4% Conv. Bonds

755f.1.13 4% Conv. Bonds

755f.1.14 4% Conv. Bonds

755f.1.15 4% Conv. Bonds

755f.1.16 4% Conv. Bonds

755f.1.17 4% Conv. Bonds

755f.1.18 4% Conv. Bonds

755f.1.19 4% Conv. Bonds

755f.1.20 4% Conv. Bonds

755g.1.1 4% Conv. Bonds

755g.1.2 4% Conv. Bonds

755g.1.3 4% Conv. Bonds

755g.1.4 4% Conv. Bonds

755g.1.5 4% Conv. Bonds

755g.1.6 4% Conv. Bonds

755g.1.7 4% Conv. Bonds

755g.1.8 4% Conv. Bonds

755g.1.9 4% Conv. Bonds

755g.1.10 4% Conv. Bonds

755g.1.11 4% Conv. Bonds

755h.1.1 4% Conv. Bonds

755h.1.2 4% Conv. Bonds

755h.1.3 4% Conv. Bonds

755h.1.4 4% Conv. Bonds

755h.1.5 4% Conv. Bonds

755h.1.6 4% Conv. Bonds

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755h.1.8 4% Conv. Bonds

755h.1.9 4% Conv. Bonds

755h.1.10 4% Conv. Bonds

755h.1.11 4% Conv. Bonds

755i.1.1 4% Conv. Bonds

755i.1.2 4% Conv. Bonds

755i.1.3 4% Conv. Bonds

755i.1.4 4% Conv. Bonds

755i.1.5 4% Conv. Bonds

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755i.1.10 4% Conv. Bonds

755i.1.11 4% Conv. Bonds

755j.1.1 4% Conv. Bonds

755j.1.2 4% Conv. Bonds

755j.1.3 4% Conv. Bonds

755j.1.4 4% Conv. Bonds

755j.1.5 4% Conv. Bonds

755j.1.6 4% Conv. Bonds

755j.1.7 4% Conv. Bonds

755j.1.8 4% Conv. Bonds

755j.1.9 4% Conv. Bonds

755j.1.10 4% Conv. Bonds

755k.1.1 4% Conv. Bonds

755k.1.2 4% Conv. Bonds

755k.1.3 4% Conv. Bonds

755k.1.4 4% Conv. Bonds

755k.1.5 4% Conv. Bonds

755k.1.6 4% Conv. Bonds

755k.1.7 4% Conv. Bonds

755k.1.8 4% Conv. Bonds

755k.1.9 4% Conv. Bonds

755k.1.10 4% Conv. Bonds

755l.1.1 4% Conv. Bonds

755l.1.2 4% Conv. Bonds

755l.1.3 4% Conv. Bonds

755l.1.4 4% Conv. Bonds

755l.1.5 4% Conv. Bonds

755l.1.6 4% Conv. Bonds

755l.1.7 4% Conv. Bonds

755l.1.8 4% Conv. Bonds

755l.1.9 4% Conv. Bonds

755l.1.10 4% Conv. Bonds

755m.1.1 4% Conv. Bonds

755m.1.2 4% Conv. Bonds

755m.1.3 4% Conv. Bonds

755m.1.4 4% Conv. Bonds

755m.1.5 4% Conv. Bonds

755m.1.6 4% Conv. Bonds

755m.1.7 4% Conv. Bonds

755m.1.8 4% Conv. Bonds

755m.1.9 4% Conv. Bonds

755m.1.10 4% Conv. Bonds

755n.1.1 4% Conv. Bonds

755n.1.2 4% Conv. Bonds

755n.1.3 4% Conv. Bonds

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755n.1.5 4% Conv. Bonds

755n.1.6 4% Conv. Bonds

755n.1.7 4% Conv. Bonds

755n.1.8 4% Conv. Bonds

755n.1.9 4% Conv. Bonds

755n.1.10 4% Conv. Bonds

755o.1.1 4% Conv. Bonds

755o.1.2 4% Conv. Bonds

755o.1.3 4% Conv. Bonds

755o.1.4 4% Conv. Bonds

755o.1.5 4% Conv. Bonds

755o.1.6 4% Conv. Bonds

755o.1.7 4% Conv. Bonds

755o.1.8 4% Conv. Bonds

755o.1.9 4% Conv. Bonds

755o.1.10 4% Conv. Bonds

755p.1.1 4% Conv. Bonds

755p.1.2 4% Conv. Bonds

755p.1.3 4% Conv. Bonds

755p.1.4 4% Conv. Bonds

755p.1.5 4% Conv. Bonds

755p.1.6 4% Conv. Bonds

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S. C. HERN PACIFIC COMPANY
BALANCE SHEET OF GENERAL LEDGER

1449

2001. COMPARATIVE GENERAL BALANCE SHEET—LIABILITY SIDE

STRUCTURE, operating the schedule of the restorations, Capital Budget Sheet treatment in the Uniform System of Accounts for State Railways Corporation. The entries in this sheet should be consistent with those in the comparative balance sheet, the pages 1-100. The entries in item (e), should be related to conform as far as possible to the accounting requirements of the Uniform System of Accounts.

COMPARATIVE GENERAL BALANCE SHEET-LIABILITY SIDE

Stock		(b) Total book liability at a charge of 5% (\$38,585,511)	(b) Reopenable liabilities not included in (b) —	383,581,151
(731) Capital stock (p. 223)				
(732) Stock liability for conversion (pp. 221 and 225)				
6,304,845				
383,581,151				
516,293				
299,931				
75,531 Funded debt in unmatured (753) Long-term debt in default (755) Recipients' and trustees' securities (220), and (220A)		(19,239,820) 395,832,935	12,980,375	382,832,580
516,293				
75,531 Grants in aid of construction				
299,931				
111,128,136				
288,438,067				
(1) Notes p. 232				
(B) Open accounts (p. 232)				
Fiscal long-term debt				
General Liabilities Adjustments				
75,531 Re-organization adjustments of capital				
75,531 Current Liabilities				
18,000,000				
7,381 Unpaid dividends payable p. 232.				
2,752,956 (750) Trade and car-service balances payable				
7,313,230 (750) Unpaid accounts and wages payable				
2,504,152 (761) Miscellaneous accounts payable				
1,346,563 (762) Interest unpaid unpaid				
— (763) Dividends matured unpaid				
2,970,715 (764) Unmatured interest accrued				
80,409 (767) Unmatured rents accrued				
1,300,181 (768) Other current liabilities				
36,248,319				
(See note 1, page 211)				
DEFERRED LIABILITIES				
(See note 1, page 211)				
20,141				
200				
(See note 1, page 211)				
Total current liabilities				
DEFERRED LIABILITIES				
(See note 1, page 211)				
2,386,723				
2,386,723				
U.S. ADJUSTED CREDITS				
(771) Tax liability				
(772) Premium on funded debt				
(773) Insurance and casualty reserves				
2,165,422 (774) Maintenance reserves				
77,093,312 (775) Accrued depreciation—Build (p. 239)				
2,904,312 (776) Accrued depreciation—Equipment (p. 238)				
11,288,950 (777) Miscellaneous physical property (p. 239)				
97,715,046				
624,311 (778) Addition to property through income and surplus				
124,116 (780) Funded debt retired through income and surplus				
5,077 (781) Shaking fund reserves				
150,000,000 (782) Miscellaneous fund reserves				
150,753,534 (783) Appropriated surplus				
122,851,229 (784) Profit and loss credit				
375,604,332 (785) Total corporate surplus				

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titles other than those reported in section 32



[Title of District Court and Cause.]

ANSWER

Now Comes the United States of America by Frank J. Hennessy, United States Attorney, and for answer to the complaint filed herein admits, denies and states to the Court, as follows:

I.

Paragraph numbered "1" is admitted.

II.

Paragraph numbered "2" is admitted.

III.

Paragraph numbered "3" contains no material allegation of fact, but consists of statements of conclusions of law and, therefore, it does not require answering.

IV.

Paragraph numbered "4" contains no material allegation of fact, but consists of statements of conclusions of law and, therefore, it does not require answering.

V.

Paragraph numbered "5" is admitted.

VI.

Answering paragraph numbered "6", it is admitted that the plaintiff had outstanding on April 23, 1940, \$3,772,763.0564 shares of its capital [34] stock having a par value of \$100; but as to the balance of the paragraph, the defendant is without

knowledge or information sufficient to form a belief as to the truth of the averments.

VII.

Paragraph numbered "7" is admitted.

VIII.

Paragraph numbered "8" is admitted.

IX.

Paragraph numbered "9" is admitted.

X.

Paragraph numbered "10" is denied. Except it is admitted that on June 17, 1943, the plaintiff filed a claim for the redemption of used stamps in the amount of \$46,687.95, which it purchased on February 26, 1943 and the defendant admits that the Exhibit A to the complaint is a copy of such claim.

XI.

Paragraph numbered "11" is admitted.

XII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered "12".

XIII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered "13". However, the defendant says that notwithstanding any requirement of the Interstate Commerce Commis-

sion, the plaintiff has never paid a documentary stamp tax (other than that which it seeks to recover by this action) on any part of the amount of \$6,304,845, which it dedicated to its capital stock account and intermingled with the old capital in the amount of \$377,276,305.64, which resulted in an increased total capital stock account of \$383,-581,150.64, and against which the new no par value stock was issued as alleged in paragraph numbered "7" of plaintiff's complaint. [35]

XIV.

Paragraph numbered "14" is admitted, except the two last sentences thereof, as to those sentences the defendant is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

XV.

Paragraph numbered "15" is denied. Except, it is admitted that in the exchange of its outstanding par-value stock for no-par value stock plaintiff's capital stock account was increased to \$383,581,-150.64 by the dedication of the new capital in said amount of \$6,304,845.

XVI.

Paragraph numbered "16" is denied.

XVII.

Paragraph numbered "17" is admitted.

XVIII.

Paragraph numbered "18" is denied.

XIX.

Paragraph numbered "19" is denied.

XX.

Paragraph numbered "20" is denied.

XXI.

Paragraph numbered "21" is denied.

Wherefore, the defendant having fully answered the complaint herein prays that the plaintiff take nothing and that the defendant recover his costs.

FRANK J. HENNESSY,
United States Attorney.

By WILLIAM E. LICKING,
Assistant U. S. Attorney.

[Endorsed]: Filed July 30, 1947.

[36]

[Title of District Court and Cause.]

PETITION OF SOUTHERN PACIFIC COMPANY, A Delaware Corporation, to be Substituted as Plaintiff, in Place of Southern Pacific Company, a Kentucky Corporation.

Southern Pacific Company, a corporation organized and existing under the laws of the State of Delaware, respectfully shows to this court:

1. That this is an action for the recovery of stamp taxes paid by Southern Pacific Company, a Kentucky corporation, plaintiff herein. as more fully appears from the complain herein, a copy of

which is attached hereto, marked Exhibit A and made a part hereof.

2. That Southern Pacific Company, a Kentucky corporation, [37] plaintiff herein, by a written instrument dated September 30, 1947, a copy of which is attached hereto and marked Exhibit B, transferred and assigned to petitioner, under a Plan of Reincorporation, all its business, franchises, assets, and properties, including all its right, title, and interest in the claim asserted herein and that petitioner has ever since been and is now the lawful owner of the claim asserted herein; that after said reincorporation, the same stockholders were in control of petitioner as were in control of said Southern Pacific Company, a Kentucky corporation, and their stockholdings in petitioner were in the same proportion as their stockholdings in said Kentucky corporation.

3. That the following proceedings have been had in this action:

February 9, 1946—Complaint filed;

February 11, 1946—Summons served;

March 4, 1947—Defendant filed motion to strike certain allegations of the complaint;

June 25, 1947—Defendant's motion to strike denied by court;

July 30, 1947—Answer of defendant filed;

August 25, 1947—Case set for trial on November 20, 1947.

No further proceedings have been had in this action.

Wherefore, petitioner prays that an order be entered herein substituting it as party plaintiff herein in place of Southern Pacific Company, a Kentucky corporation.

Dated San Francisco, California, October 15, 1947.

/s/ GEORGE L. BULAND,
/s/ FRANK J. GALLAGHER,
Counsel for Plaintiff.

(Verification.)

(Here follows Exhibits "A" and "B".)

[Endorsed]: Filed Oct. 16, 1947.

[38]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

It is ordered, that Southern Pacific Company, a Delaware corporation, be and it is hereby substituted as party plaintiff herein in place of Southern Pacific Company, a Kentucky corporation, and that the action be continued by and in the name of said Southern Pacific Company, a Delaware corporation, without prejudice to any proceeding already had in this action.

Dated Oct. 20th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1947.

[39]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the above-entitled parties, by their respective attorneys, that the following facts shall be taken as true, each of the parties reserving the right to submit other and further facts not inconsistent with the facts herein stipulated.

1. Plaintiff is a corporation of the State of Delaware, incorporated on March 21, 1947, with its principal office in San Francisco, California, within the First Internal Revenue [40] Collection District of the State of California.

2. Plaintiff is the successor in interest to Southern Pacific Company, a Kentucky corporation, hereinafter referred to as the "Old Company". On September 30, 1947, it succeeded to all of the business and assets and assumed all of the liabilities of the Old Company under a Plan of Reincorporation involving a mere change in the state of incorporation, plaintiff having the same capital structure and the same number of issued and outstanding shares as the Old Company. After the reincorporation, the same stockholders were in control of plaintiff as were in control of the Old Company, and their stockholdings in plaintiff were in the same proportion as their stockholdings in the Old Company. On September 30, 1947, the Old Company, in accordance with the applicable statutes of the Commonwealth of Kentucky, filed with the Secretary of State of that Commonwealth notice

of its intention to dissolve. On October 20, 1947, by order of this Court the new company, the Delaware corporation, was substituted as plaintiff in this action in place of the Old Company.

3. At all times between January 1, 1943, and March 31, 1945, the defendant was the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue District of California, but is not now in office as such collector. Said defendant is a resident of the State of California and of the Southern Division of the Northern United States District Court District of said State.

4. The Old Company was incorporated under the laws of the Commonwealth of Kentucky on March 17, 1884, and continuously from said date to and including September 30, 1947, was engaged in business in interstate commerce as a common carrier by railroad. Between the date of its incorporation and April 23, 1940, the Old Company issued and had outstanding on the latter date 3,772,763.0564 shares of capital stock having a par value of \$100 [41] a share, of which 3,562,606.0564 shares were issued at par and 210,157 shares were issued at a premium of \$6,304,845 over par. A substantial part of said stock was issued during periods when Federal stamp taxes on the issuance of capital stock were in effect, and on all such parts of its outstanding capital stock the Old Company duly paid the Federal stamp taxes then in effect.

5. By an amendment of the Old Company's Charter or Certificate of Incorporation, duly auth-

orized by the stockholders of the Old Company at a meeting duly called and held on April 3, 1940, and duly filed and recorded in the office of the Secretary of State for the Commonwealth of Kentucky on April 22, 1940, the structure of the Old Company's capital stock, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares were issued and outstanding and 2,171,754.9436 shares were unissued, was changed to the same number of shares without nominal or par value. 3,772,763.0564 shares of said no par value stock were issued and exchanged with the Old Company's stockholders for the 3,772,763.0564 shares of par value stock then outstanding. In connection with said amendment, and in connection with the issuance and exchange of said stock as above stated, no new money was paid in and no property was transferred to the Old Company.

6. The par value shares of capital stock of the Old Company issued and outstanding as of the date of said exchange represented the entire net beneficial interest in all of the assets of the Old Company before the amendment of its charter as referred to in the foregoing paragraph 5, and after said amendment and issuance of said certificates representing 3,772,763.0564 shares of no par value in exchange for said par value shares, the persons receiving the new shares remained the owners of the said entire beneficial interest in the same assets of the Old Company, and in the same proportion and not otherwise. [42] At the time of said amendment of the Old Company's charter providing for

the said no par stock, the earned surplus of the Old Company as shown by its books, was \$378,126,243, and there was no transfer of any part of said earned surplus to capital.

7. Said amendment to the charter of the Old Company reads as follows:

"AMENDMENT"

**To Charter or Articles of Incorporation Changing
the Capital Stock of Southern Pacific Company.**

I, A. D. McDonald, the President of Southern Pacific Company, a Kentucky corporation, and we, the undersigned, a majority of the Board of Directors of Southern Pacific Company, with the consent in writing of the owners of more than two-thirds of its capital stock, and being hereunto specially authorized by vote of stockholders of said Company representing and holding more than two-thirds in amount of the capital stock of said Company at a legal meeting of said stockholders duly convened and held at the principal office of the Company at Spring Station, Woodford County, Kentucky, on the 3rd day of April, 1940, pursuant to and after notice of such meeting and of the purposes thereof given in the manner and for the time prescribed by law and the by-laws of said Company, do hereby certify and state that the Charter or Articles of Incorporation of Southern Pacific Company are amended, and its capital stock is changed as follows:

That the authorized capital stock of said Company consisting of 5,944,518 common shares of the

par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.-9436 shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such proper corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

In Witness Whereof, we have hereunto severally subscribed our names as of this 15th day of April, 1940.

/s/ A. D. McDONALD,

President and Director.

/s/ WM. DeFOREST MANICE,

Director.

/s/ JACKSON E. REYNOLDS,

Director.

/s/ CLEVELAND E. DODGE,

Director.

/s/ LAWRENCE COOLIDGE,

Director.

/s/ WALTER DOUGLAS,

Director.

/s/ CHARLES E. PERKINS,

Director.

/s/ HENRY L. CORBETT,

Director.

/s/ V. H. ROSSETTI,

Director.

/s/ J. B. BLACK,

Director.

/s/ ALLEN L. CHICKERING,

Director.

/s/ STUART L. RAWLINGS,

Director.

/s/ HARVEY S. MUDD,

Director.

/s/ BEN C. DEY,

Director."

[43]

8. The aforesaid amendment was duly filed and recorded in the office of the Secretary of State for the Commonwealth of Kentucky on April 22, 1940, and was in force and effect at the time of the assessment and payment of the stamp tax which is the subject of this action and of plaintiff's complaint.

9. Said meeting of the stockholders of the Old Company, at which said amendment was authorized, was called by a resolution duly adopted at a regular meeting of the Board of Directors of the Old Company, duly called and held on January 11, 1940. Said resolution reads as follows:

"The President brought to the attention of the Directors the matter of changing the par value stock of this Company to stock without nominal par value. After a full discussion it was the consensus of opinion that it would be advisable for this Company in aid of meeting its capital requirements and for other corporate purposes, to be prepared, when circumstances permit, to issue its capital stock through the exercise of conversion rights to be granted to holders of its indebtedness, or by other appropriate method, at such times and on such terms as this Board may determine; that it does not seem probable that capital stock may be issued in the near future for a consideration equal to its present par value of \$100 per share and that in order to permit capital stock to be of effective aid in financing under such conditions the capital stock of the Company should be changed from par value stock to stock without nominal par value.

On motion, duly made and seconded, it was, subject to the consent of the stockholders and to authorization by the Interstate Commerce Commission, unanimously

Resolved,

That the authorized capital stock of said Company, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.9436 shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, [44] for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

That upon the approval of the stockholders being duly obtained, amendment to the Charter or Articles of Incorporation changing the capital stock of Southern Pacific Company be executed by the President and by the Directors of this Company, or the majority thereof, and attested and filed as required by law, and that the stockholders be requested to take any other and further action

necessary or appropriate to authorize the directors and officers of the Company to carry out the said amendment of the Charter or Articles of Incorporation changing the capital stock of this Company.

Resolved Further, That the Secretary of the Company be directed to request the stockholders of this Company to give their written consent to the proposed amendment to the Charter or Articles of Incorporation changing the capital stock of this Company, which consent may, in his discretion, be embodied in the form of proxies to be sent to the stockholders in connection with the annual meeting of this Company to be held April 3, 1940, and the Secretary of the Company, in giving the usual notice of the annual meeting of stockholders, it hereby directed to give appropriate notice that there will be submitted for vote by the stockholders at the said annual meeting resolutions approving the foregoing amendment of the Charter or Articles of Incorporation changing the capital stock of the Southern Pacific Company, and the annual meeting shall be held for the purpose, among others, of voting upon the said amendment and the said change in capital stock and authorizing action incidental thereto; that with the notice and form of proxy there should be sent to the stockholders appropriate proxy statement as required by the rules of the Securities and Exchange Commission, and also letter from the President of this Company stating the reasons for the recommendation of the Directors in this respect; said notice, proxy, proxy statement, and letter to be substantially in form

as submitted at this meeting, with such variations as may be approved by the President.

Resolved Further, That this Company make application to the Interstate Commerce Commission for authority to cause to be issued in exchange for its par value common stock now outstanding 3,772,-763.0564 shares of this Company's common capital stock without nominal par value, and that A. D. McDonald, President, and John G. Walsh, Vice President, and F. Van Note, Vice President, of this Company are hereby severally designated as an executive officer to make, verify and file said application and to take such other action in connection therewith as he may deem requisite or expedient.

Resolved Further, That the proper officers be and [45] they are hereby authorized to take all steps necessary or proper to secure the listing of the said stock without nominal par value on the New York Stock Exchange and other stock exchanges and registration with the Securities and Exchange Commission; that John G. Walsh, Vice President, F. Van Note, Vice President and Controller, or George L. Buland, Assistant General Counsel, be and he hereby is authorized to make application for the listing of the said stock upon the Stock Exchanges and is designated to appear before the Committee on Stock List of said Exchanges with authority to make such changes in such applications or in any agreements relative thereto as may be necessary to conform with the requirements for listing."

10. By report and order of the Interstate Commerce Commission, dated March 26, 1940, in Finance Docket No. 12801, 239 I.C.C. 293, copy of which is attached, the Interstate Commerce Commission authorized the Old Company to issue not to exceed 3,772,763.0564 shares of common capital stock without nominal or par value, said stock to be exchanged on a share-for-share basis for an equal number of shares of outstanding common stock of a par value of \$100 a share.

11. At said annual meeting of the stockholders of the Old Company, duly called and held at Spring Station, Kentucky, on April 3, 1940, the stockholders of the Old Company adopted the following resolution:

"The Chairman stated to the stockholders that among the matters to be presented to the stockholders at this meeting, as stated in the notice of such meeting, was the proposal for the amendment of the Charter or Articles of Incorporation changing the capital stock of the Southern Pacific Company so as to provide for stock without nominal par value in lieu of stock with a nominal par value of \$100 per share, and that the taking of such action had been recommended to the stockholders by the Board of Directors by resolution dated January 11, 1940.

Thereupon the following resolutions were duly proposed and seconded, and a stock vote thereon by ballot was requested and ordered.

Resolved, That the stockholders of the Southern Pacific Company do hereby authorize and consent

That the authorized capital stock of said Company, consisting of 5,944,518 common shares of the par value of \$594,451,800, of which 3,772,763.0564 shares are issued and outstanding, and 2,171,754.-9436 [46] shares are unissued, be changed into the same number of common shares without nominal par value;

That 3,772,763.0564 shares of said shares without nominal par value be substituted, share for share, for the said presently issued and outstanding shares of the par value of one hundred dollars (\$100) each;

That the unissued 2,171,754.9436 shares of said authorized shares without nominal par value may be issued by the Company from time to time in such amounts, upon such terms, for such proper corporate purposes, and for such consideration or considerations as may be fixed from time to time by the Board of Directors.

That the foregoing changes and provisions be and the same are hereby adopted as an amendment of the Charter or the Articles of Incorporation of the Southern Pacific Company, and that the President and a majority of the Board of Directors of this Company be and they are hereby authorized to sign and cause to be filed and recorded as required by law in the State of Kentucky an amendment of the said Charter or Articles of Incorporation embodying the foregoing changes and provisions, and the proper officers of the Company are authorized to take or cause to be taken all such action as may be necessary or required by

law to make effective the said amendment changing the capital stock of this Company.

That the Board of Directors and proper officers of this Company are hereby authorized and empowered to take any and all action necessary or appropriate to carry out the effect and intent of said amendment and the issuance or substitution of stock as therein authorized, and the said Board of Directors are authorized and empowered to provide in the contracting of any indebtedness for the conversion thereof into the stock of this Company in such amounts, upon such terms, and for such consideration or considerations as the said Board of Directors may fix and determine from time to time."

12. Pursuant to the aforesaid amendment of its Charter, the Old Company issued in exchange for its then outstanding par value stock an identical number of shares of no par value stock. The Old Company's stockholders paid no money, nor any consideration, to the Old Company for new no par value stock, except that they surrendered said old par value stock, and received in exchange for said old stock nothing but the new stock.

13. Prior to the aforesaid exchange, the Old Company's stock account as shown in its balance sheet for March 31, 1940, was set forth as follows:

"Stock	
751. Capital Stock	\$377,276,305.64
753. Premium on Capital Stock	6,304,845.00
Total Stock	\$383,581,150.64"

The Old Company's stock account prior to the aforesaid exchange was also shown in identical form in its annual report to the Interstate Commerce Commission, except that the figures in cents were not shown; the pertinent page of such report for the year 1940 entitled "Balance at Beginning of Year" carrying this account as follows:

"Stock

751. Capital Stock	\$377,276,306
753. Premium on Capital Stock	6,304,845
Total Stock	\$383,581,151

14. The Subaccount 751, entitled "Capital Stock", represented the total par value of the Old Company's capital stock. The Subaccount 753, entitled "Premium on Capital Stock", represented the excess over par received by the Old Company upon the issuance of 210,157 shares of its capital stock in the following circumstances:

In 1909 certain bonds were issued by the Old Company which gave the holders thereof the privilege of converting their bonds into paid-up shares of common stock of the Old Company at the rate of \$130 par value of bonds for each \$100 par value of stock, on or before June 1, 1919. Up to January 9, 1912, \$662,090 par value of said bonds were surrendered, and the Company issued in place thereof 5,093 shares of its \$100 par value capital stock. The par value of the stock was entered in the "Capital Stock" Subaccount, and the excess of the par value of the bonds over the par value of the stock, namely, \$152,790, was entered in the

"Premium on Capital Stock" Subaccount. There was no law taxing the original issue of certificates of stock [48] when this conversion was made, so that no tax was payable on the original issue of these 5,093 shares.

In 1919 bonds of a par value of \$26,657,150 were turned in and the Old Company issued in place thereof 205,055 shares of its capital stock, each share having a par value of \$100. The par value of the stock was entered in the "Capital Stock" Subaccount, and the excess of the par value of the bonds over the par value of the stock, namely, \$6,151,650, was credited to the "Premium on Capital Stock" Subaccount. In accordance with the law, revenue stamps at the rate of five cents (5 cents) on each \$100 of par value of the 205,055 shares of \$100 par value stock were purchased by the Old Company and actually attached to the stock books.

In 1929 the Old Company issued certain bonds which had warrants attached thereto, entitling the owners thereof to purchase on or before May 1, 1934, 3 shares of the Company's \$100 par value of stock at \$145 per share, plus adjustment of accrued dividends. A total of 9 shares of the Old Company's stock was purchased pursuant to this arrangement in 1930 for a total price of \$1,305. The par value of the stock was entered in the "Capital Stock" Subaccount, and the excess of \$405 over par was credited to the "Premium on Capital Stock" Subaccount. The correct amount of Federal revenue stamps applicable to the original issue of these 9 shares was affixed to the stock

books of the Old Company at the time these 9 shares were issued.

15. After the exchange of no par value stock for par value stock, the accounts of the Old Company were identical with what they had been immediately prior thereto, except that the amounts in the two subaccounts of the stock account were merged and the total of the two, \$383,581,150.64, was placed in "Capital Stock" Subaccount 751. Subsequent to the exchange, [49] the Old Company's stock account, as shown in its balance sheet for April 30, 1940, was carried as follows:

		"Stock
751.	Capital Stock	\$383,581,150.64
753.	Premium on Capital Stock
		<hr/>
	Total Stock	\$383,581,150.64"

The Old Company's stock account, subsequent to the above exchange, was also shown in identical form in its annual report to the Interstate Commerce Commission for 1940, except that the figures in cents were not shown; the pertinent page of such report for the year 1940, entitled "Balance at Close of Year", carrying this account as follows:

		"Stock
751.	Capital Stock	\$383,581,151
753.	Premium on Capital Stock
		<hr/>
	Total Stock	\$383,581,151"

There was no change in the Old Company's surplus account, no change in the number of its shares outstanding, and no change in its "Total Stock"

Account. There was a transfer of the amounts of \$152,790, \$6,151,650 and \$405, aggregating the "Premium on Capital Stock" total of \$6,304,845, which are set forth in the second, third and fourth sub-paragraphs of paragraph "14" of this stipulation and were added to the "Capital Stock" account of \$377,276,305.64, making the total of \$383,581,150.64 set forth in this numbered paragraph "15". No original issue tax was ever paid in respect to the amount of \$6,304,845 transferred from "Premium on Capital Stock" account to the "Capital Stock" account other than as set forth in paragraph "17" of this stipulation and which the plaintiff seeks to recover in this action.

16. The Commissioner of Internal Revenue, by letter dated [50] July 15, 1942, addressed to Internal Revenue Agent R. C. Cannedy at Los Angeles, California, ruled that, as the result of the change of the Old Company's stock from \$100 par value shares to no par value shares, the original issue stamp tax became due under Section 1802(a) of the Internal Revenue Code. It was held by the Commissioner that, by reason of the transfer of the \$6,304,845 from Subaccount 753, "Premium on Capital Stock", to Subaccount 751, "Capital Stock", additional capital in that amount was dedicated to the capital account; that this amount represented capital with respect to which no previous issue tax had ever been paid; and that the tax was due with respect to the full amount of \$383,581,150.64 in the Old Company's "Capital Stock" Subaccount 751 because "the new capital and the

old capital were intermingled in such a way that it cannot be said that the increase in the Capital Stock Account can be allocated to specific shares." Demand was made upon the Old Company for payment of the issue tax with respect to the entire amount in "Capital Stock" Subaccount 751 following the change to no par shares.

17. On or about February 26, 1943, the Old Company paid, under protest, to the defendant, Harold A. Berliner, who was then the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, the sum of \$46,687.95 in payment of said Federal stamp tax above stated.

18. Thereafter, on or about June 11, 1943, and within the applicable period of limitations, the Old Company served upon and filed with the Commissioner of Internal Revenue of the United States, by filing the same with the then Collector of Internal Revenue for the First District of California, the District where said tax was paid, pursuant to law and to the rules and regulations duly adopted and promulgated by said Commissioner [51] of Internal Revenue, its written and verified claim for refund and repayment of said amount of \$46,687.95, together with its written statement in support of said claim. Copies of said claim and of said supporting statement are attached to the complaint filed herein.

19. On March 9, 1944, said Commissioner of Internal Revenue of the United States rejected

said claim of the Old Company for refund and repayment of said amount paid by the Old Company on account of said stamp tax.

20. No part of said stamp tax paid by the Old Company has ever been refunded or credited to it or to plaintiff.

21. Plaintiff is legally entitled to receive refund of any such stamp taxes so paid by the Old Company that are properly refundable, together with interest at the rate provided by applicable law on such amount.

Dated this 20th day of November, 1947.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
United States Attorney.

By WILLIAM E. LICKING,
Assistant U. S. Attorney,
Attorney for Defendant. [52]

Interstate Commerce Commission
Finance Docket No. 12801

SOUTHERN PACIFIC COMPANY STOCK

Submitted March 25, 1940.

Decided March 26, 1940.

Authority granted to issue not exceeding 3,772,-
763.0564 shares of common capital stock without
nominal or par value in exchange, on a share for
share basis, for an equal number of shares of out-

standing common stock with a par value of \$100 a share.

Ben C. Dey, George L. Buland, and Charles L. Minor for applicant.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller.

By Division 4:

The Southern Pacific Company, on March 7, 1940, applied for authority to issue 3,772,763.0564 shares of common capital stock without nominal or par value. No objection to the application has been offered.

The applicant was incorporated under the laws of the State of Kentucky and has an authorized capital stock of \$594,451,800. Of this amount, \$377,-276,305.64 is outstanding, being 3,772,763.0564 shares of common stock with a par value of \$100 a share.

The applicant proposes to amend its articles of incorporation to change its authorized capital stock from shares with a par value of \$100 a share to shares without nominal or par value, the number of authorized shares to remain unchanged. Of the total authorized shares, 3,722,763.0564 will be issued to the holders of the outstanding stock, upon the surrender of the outstanding certificates, on a share for share basis and will be entered in the applicant's capital stock account at \$383,581,150.64, [53] representing the par value and premium on its

outstanding stock. The remainder of the stock, 2,171,-754.9436 shares, is to remain unissued.

The board of directors, on January 11, 1940, approved and authorized the proposed amendment to the applicant's articles of incorporation, subject to the authorization and approval of the stockholders. The authority herein requested is to enable the applicant to exchange its stock on the basis indicated.

Pending the engraving of new stock certificates, the applicant will issue certificates of its existing common stock stamped to indicate the change from stock with a par value of \$100 a share to stock without nominal or par value.

Under the laws of the State of the applicant's incorporation its stock cannot be issued for a consideration less than par value, and under present conditions it is improbable that the stock can be disposed of in the near future for a consideration equal to its par value. The change from stock with par value to stock without nominal or par value is essential if stock is to be issued in financing when opportunity therefor arises.

The annual meeting of the applicant's stockholders will be held on April 3, 1940, at which meeting the proposed amendment to the applicant's articles of incorporation will be presented for approval and authorization. As all requisite action has not yet been taken to authorize and approve the matters and things herein involved, our order will require that the applicant shall file in this proceeding, before issuing any of the stock without nominal or

par value, a certified copy of the resolution adopted by the stockholders authorizing and approving [54] the amendment to the applicant's articles of incorporation, together with a duly attested copy of the amendment to its articles of incorporation providing for the change in the capital stock heretofore mentioned.

We find that the proposed issue by the Southern Pacific Company of not exceeding 3,772,763.0564 shares of common capital stock without nominal or par value, as aforesaid, (a) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered. [55]

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 26th day of March, A. D. 1940.

Finance Docket No. 12801

Southern Pacific Company Stock

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the Southern Pacific Company be, and it is hereby, authorized to issue not exceeding 3,772,763.0564 shares of common capital stock without nominal or par value; said stock to be exchanged, on a share for share basis, for an equal number of shares of outstanding common stock of a par value of \$100 a share.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission.

It is further ordered, That, before issuing any of the stock herein authorized, the applicant shall file in this proceeding a certified copy of the resolution of the stockholders authorizing and approving the amendment to its articles of incorporation and a duly attested copy of said amendment.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by Division 4, dated February 19, 1927, respecting applications filed under section 20-a of the Interstate Commerce Act. [56]

And it is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, Division 4.

(Seal)

W. P. BARTEL,
Secretary.

[Endorsed]: Filed Nov. 20, 1947.

[57]

[Title of District Court and Cause.]

Action to recover alleged overpayment of documentary stamp tax. Judgment for defendant.

George L. Buland and Frank J. Gallagher, San Francisco, California, attorneys for plaintiff.

Frank J. Hennessy, United States Attorney, and William E. Licking, United States Attorney (Thereon Lamar Caudle, Assistant Attorney General, and Andrew D. Sharpe and F. A. Michels, Special Assistants to the Attorney General, on the brief) of San Francisco, California, attorneys for defendant. [58]

MEMORANDUM OPINION

Roche, District Judge: Plaintiff seeks to recover the sum of \$46,687.95 with interest, on account of an alleged overpayment of documentary stamp taxes. The tax was levied on shares of no-par value stock issued in exchange for par value stock and the question for decision is whether, under the circumstances of this case, such issue constituted an "original issue" within the meaning of Sections 1800 and 1802 of the Internal Revenue Code.¹

¹ Sec. 1800. Imposition of Tax.

There shall be levied, collected, and paid, for and in respect to the several bonds, debentures, or certificates of stock * * * and things mentioned and described in sections 1801 to 1807, inclusive, * * * (26 U.S.C. 1940 ed., Sec. 1800.)

Sec. 1802 (as amended by Revenue Act of 1939, c. 247, 53 Stat. 862, Sec. 1). Capital Stock (and Similiar Interests.)

(a) Original Issue.—On each original issue, whether on organization or reorganization, of shares

The facts were stipulated and are substantially as follows:

During the tax period involved the plaintiff existed as a Kentucky corporation engaged in business in interstate commerce as a common carrier by rail. Prior to April, 1940, plaintiff's capital

or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: Provided, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certification (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued. (26 U.S.C. 1940 ed., Section 1802.)

stock consisted of 5,944,518 common shares, each having a par value of \$100. Of these, 3,772,763.0564 shares were issued and outstanding and 2,171,754.9436 shares were unissued. Any stamp tax due on the issued shares had been paid. In April, 1940, the articles of incorporation were amended to provide for changing the capital stock from par value to no-par value shares and an even exchange was effected with the par value shareholders. This change in the type of stock did not affect the proportionate interest of the shareholders in the corporation's assets, and had the capital stock account remained unchanged, the new issue would have been free from any stamp tax. American Laundry Machinery Co. v. Dean, 292 Fed. 620.

However, prior to the exchange the stock account, which was kept according to the Interstate Commerce Commission regulations, showed capital stock in the sum of \$377,276,305.64 (the total par value of the issued stock) and premium on capital stock in the sum of \$6,304,845.00. This premium resulted from the sale to bondholders of nine shares of stock at \$145 a share and the conversion of bonds into paid-up shares of common stock at the rate of \$130 par value of bonds for each \$100 par value of stock. The premium thus represented the amount received in excess of the stock par value.

After the exchange of no-par value stock for the par value stock, the amounts previously listed separately in the stock account as "Capital Stock" and "Premium on Capital Stock" were merged and

the total of the two, \$383,581,150.64 was placed in the "Capital Stock" subaccount.

The Commissioner of Internal Revenue determined that the transfer of the amount previously listed as "Premium on [60] Capital Stock" to the "Capital Stock" subaccount resulted in additional capital being dedicated to the capital stock account; that this represented capital upon which no previous issue tax had ever been paid; that the new capital and old capital were so intermingled that it was impossible to allocate to the new capital any of the no-par value shares, and that as a result the entire new issue of no-par value stock was subject to the stamp tax. The tax was paid under protest and claim for refund was denied.

Plaintiff, which now exists as a Delaware corporation, contends that the issue of no-par value stock did not result in the dedication of additional capital so as to make the issue an "original issue" within the meaning of the statute, and alternatively, that even if the original issue tax be deemed applicable, it should be limited to that portion of the total issue representing the \$6,304,845 "Premium on Capital Stock" which was transferred to the "Capital Stock" subaccount.

Plaintiff's position rests on the proposition that the premium on capital stock was always a part of the capital stock account and was set up separately, prior to the exchange of stock, only because Interstate Commerce Commission regulations so required; that the regulations likewise required its merger with the capital stock account, after the

exchange of no-par value for par value stock, but that this was merely accounting procedure. In effect, plaintiff argues that it is now being penalized by one Government department for doing what another department required.

The courts have interpreted the term "original issue", as used in Section 1802, *supra*, to be applicable to a new issue where the capital stock account has been increased either by receipt of additional consideration for the new stock or by the transfer of a given amount from paid-in surplus or earned surplus. If definite shares of the new issue can be identified as having been issued against the increase in capital, the tax is levied only on such shares. If there is such an intermingling of old and new capital that such identification is impossible, the entire [61] new issue is taxable. This is true because the tax is not on the capital behind the shares of stock but is measured by the par value of the shares (or actual value if not par value shares) represented by each stock certificate. *W. T. Grant C. v. Duggan*, 94 F. 2d 859, *Rio Grande Oil Co. v. Welch*, 101 F. 2d 454, *United States v. Pure Oil Co.*, 135 F. 2d 578.

When the corporation had only par value stock its capital stock account represented the sum total of \$100 par value for each share of stock issued. The premium on capital stock represented paid-in surplus and, under Kentucky corporation law, could have been distributed as dividends, a disposition that could not have been made of any part of the

capital stock account. With the exchange of the par value stock for an equal number of no-par value shares and the transfer of the amount in the premium account to the capital stock account, the total amount of capital behind the shares was increased. The fact that the transfer may have been required by Interstate Commerce Commission regulations does not change the realities of the situation. While the \$6,304,845 remained in the premium account no shares of stock were issued against it and therefore, no original issue tax was ever paid with respect to that amount. When it became part of the capital stock account against which the new shares were issued without any allocation of specific shares to such transferred sum, each share represented both old and new capital and was thus taxable as an original issue under the statute. *American Gas & Electric Co. v. United States*, 69 F. Supp. 614.

In accordance with the foregoing it is, therefore,

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendant and against the plaintiff and that defendant recover his costs in this behalf expended.

Dated July 16th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 16, 1948.

[62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on November 20, 1947, and was on that day submitted upon a stipulation of the facts. Upon such submission the Court took the matter under advisement and directed the filing of written briefs by the parties. The briefs having been filed and the Court, having considered the facts and the briefs and now being fully advised, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The plaintiff is a Delaware corporation. Prior to September 30, 1947, the plaintiff existed as a Kentucky corporation, engaged in business in interstate commerce as a common carrier by rail.
2. The defendant was Collector of Internal Revenue for the First Collection District of California from January 1, 1943, to March 31, 1945.
3. Prior to April 1940, plaintiff's capital stock consisted of 5,944,518 common shares of a par value of \$100 each. Of those shares, 3,772,763.0564 shares of the total par value of \$377,276,305.64 had been issued and were outstanding.
4. In April 1940 the plaintiff issued and exchanged with its stockholders 3,772,763.0564 shares of no par value stock for the [63] 3,772,763.0564 shares of the \$100 par value stock.
5. At the time of and in connection with the exchange of the stock the plaintiff added the

amount of \$6,304,845 to the capital stock account and thereby increased it to \$383,581,150.64.

6. The amount of \$6,304,845 was additional capital and no original issue tax was ever paid with respect to that amount.

7. When the amount of \$6,304,845 was transferred to the capital stock account and the new shares were issued, there was no allocation of specific shares to such transferred amount, each share represented both old and new capital and the new capital was so intermingled with the old capital that it is impossible to identify any part thereof with any of the new shares.

8. The Commissioner of Internal Revenue determined that all of the 3,772,763.0564 shares of no par value stock were taxable as an original issue and the amount of such tax was \$46,687.95.

9. The plaintiff paid the amount of \$46,687.95 to the defendant on February 26, 1943. A claim for the refund of the amount was filed June 11, 1943 and was wholly rejected by the Commissioner of Internal Revenue on March 9, 1944.

CONCLUSIONS OF LAW

1. That an original issue tax in the amount of \$46,687.95 was incurred under the provisions of Section 1802 of the Internal Revenue Code as amended upon the issuance of the 3,772,763.0564 shares of no par value stock in exchange for the like number of outstanding shares of the \$100 par value stock because of the addition of the amount of \$6,304,845 to the capital stock account without

any allocation of specific shares to such transferred amount.

2. When the \$6,304,845 became part of the capital stock account against which the new shares were issued without any allocation of specific shares to such transferred sum, each share represented both old and new capital and was thus taxable as an original issue under the statute.

3. That the plaintiff is not entitled to recover in this action.

4. That the defendant recover judgment for his costs.

Dated this 29th day of October, 1948.

MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed Oct. 29, 1948.

[64]

In the United States District Court for the Northern District of California, Southern Division.

Civil Action No. 25664-R

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue for the First Collection District of California,

Defendant.

JUDGMENT AND DECREE

The above case came on regularly for trial on November 20, 1947. The parties thereto were represented by counsel as follows: William E. Licking, Esq., Assistant United States Attorney, for the defendant Harold A. Berliner; George L. Buland, Esq., and Frank J. Gallagher, Esq., Attorneys for plaintiff Southern Pacific Company. A stipulation of facts was filed with the Court and the case ordered submitted upon briefs upon said stipulation of facts and briefs thereafter to be filed. Said briefs having been filed and considered by the Court, and the Court having heretofore filed a memorandum opinion herein and having filed its findings of facts and conclusions of law herein, Now, Therefore, from said findings of fact and conclusions of law, It Is Herby Ordered, [65] Adjudged and Decreed that plaintiff take nothing by this action and that defendant have and recover

judgment for its costs of suit herein incurred in the amount of \$10.00.

Dated this 29th day of October, 1948.

MICHAEL J. ROCHE,
Judge of the United States District Court.

Approved as to form as provided by Rule 5(d):

F. J. GALLAGHER,
Attorney for Plaintiff.

Entered in Civil Docket Nov. 1st, 1948.

[Endorsed]: Filed Oct. 29, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on November 1, 1948.

Dated November 26, 1948.

GEORGE L. BULAND,
FRANK J. GALLAGHER.

[Endorsed]: Filed Nov. 26, 1948.

[66]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
PLAINTIFF (AS APPELLANT) INTENDS
TO RELY ON APPEAL

Pursuant to Rule 75(d) of the Rules of Civil Procedure for United States District Courts, plaintiff hereby states that, upon its appeal from the judgment heretofore entered on November 1, 1948, in the above-entitled cause, said plaintiff, as appellant, intends to rely upon the following points:

1. The error of the above-named Court in finding that the amount of \$6,304,845, transferred by plaintiff's predecessor from its Premium on Capital Stock Account to its Capital Stock Account at the time of the exchange of 3,772,763.0564 shares of its no-par value stock for the like number of outstanding shares of its \$100 par value stock, was additional capital and that no original [67] issue tax was ever paid with respect to that amount.
2. The error of said Court in failing to find that the said amount of \$6,304,845 was not additional capital.
3. The error of said Court in finding and concluding that an original issue tax was incurred under the provisions of Section 1802 of the Internal Revenue Code, as amended, upon the issuance of said 3,772,763.0564 shares of no-par value stock in exchange for the like number of outstanding shares of \$100 par value stock.
4. The error of said Court in finding and concluding that when the \$6,304,845 was transferred

from the Premium on Capital Stock Account to the Capital Stock Account each of the new shares issued represented both old and new capital and was thus taxable as an original issue under the statute.

5. The error of said Court in failing to find and conclude that the exchange of no-par value stock for par value stock was effected without the capital of the corporation being increased either by transfer of surplus to Capital Account or otherwise.

6. The error of said Court in failing to find and conclude that the issue of the 3,772,763.0564 shares of no-par value stock was not an original issue within the meaning of Sections 1800 and 1802 of the Internal Revenue Code and the applicable regulation.

7. The error of said Court in finding and concluding that plaintiff is not entitled to recover in this action and that defendant is entitled to recover judgment for his costs.

8. The error of said Court in failing to find and conclude that plaintiff is entitled to recover in this action the sum of \$46,687.95, together with interest on said sum from February 26, 1943, as provided by law.

9. The error of said Court in rendering and entering judgment in this action in favor of defendant and against plaintiff [68] and directing that defendant have and recover his costs of suit herein.

10. The error of said Court in not rendering and entering judgment for plaintiff and against defendant in the sum of \$46,687.95, together with interest

on said sum from February 26, 1943, as provided by law.

Wherefore, said plaintiff and appellant prays that said judgment may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated November 30, 1948.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff and
Appellant.

(Receipt of Service.)

[Endorsed]: Filed Dec. 1, 1948.

[69]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above Court:

Pursuant to Rule 75(a) of the Rules of Civil Procedure for United States District Courts, Southern Pacific Company, a corporation, the above-named plaintiff, hereby designates the following to be contained in the record on appeal for the purposes of appeal by said plaintiff from the judgment entered herein on November 1, 1948; and you are hereby requested to make a transcript of such record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to notice of appeal heretofore filed on November

26, 1948, and to forward the same as soon as practicable to the Clerk of said Court of Appeals:

1. Complaint filed February 9, 1946. [70]
2. Answer filed July 30, 1947.
3. Petition of Southern Pacific Company, a Delaware corporation, to be substituted as plaintiff in place of Southern Pacific Company, a Kentucky corporation (excluding Exhibit A and B thereto).
4. Order of Substitution.
5. Stipulation of Facts.
6. "Memorandum Opinion" of the District Court.
7. District Court's Findings of Fact and Conclusions of Law.
8. Notice of Appeal.
9. Statement of Points upon which Plaintiff (as Appellant) intends to Rely on Appeal.
10. Clerk's Certificate to the transcript of record.
11. This designation.

Dated November 30, 1948.

GEORGE L. BULAND,
FRANK J. GALLAGHER,
Attorneys for Plaintiff and
Appellant.

(Receipt of Service.)

[Endorsed]: Filed Dec. 1, 1948.

[71]

In the District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 71 pages, numbered 1 to 71, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Southern Pacific Company, a corporation, vs. Harold A. Berliner, Former Collector of Internal Revenue, etc., No. 25664-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven Dollars and Seventy Cents (\$7.70) and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 8th day of December, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12117. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Harold A. Berliner, Former Collector of Internal Revenue

for the First Collection District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 8, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

Civil Action No. 12117

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF THE REC-
ORD TO BE PRINTED

In accordance with Rule 19(6) of the Rules of the Court, appellant adopts, as its statement of points upon which it intends to rely upon the appeal in this cause, the "Statement of Points upon which Plaintiff (as Appellant) Intends to Rely

on Appeal'', filed in the District Court and found on pages 67 to 69, inclusive, of the original certified record herein, and designates for printing the entire transcript.

/s/ GEORGE L. BULAND,
/s/ FRANK J. GALLAGHER,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 14, 1948. Paul P.
O'Brien, Clerk.

